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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 09/776,780 | 02/06/2001 | Roy Zisapel | 1706-34-1 | 3909 |

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EXAMINER

COULTER, KENNETH R

ART UNIT

PAPER NUMBER

2154

DATE MAILED: 09/11/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

| | |
|---------------------------------------|---------------------------------------|
| Application No. 09/776,780 | Applicant(s) Zisapel et al. |
| Examiner Kenneth R. Coulter | Art Unit 2154 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on _____

2a) This action is **FINAL**. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle* 1035 C.D. 11; 453 O.G. 213.

Disposition of Claims

4) Claim(s) 5-11, 13, and 18-27 is/are pending in the application

4a) Of the above, claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 5-11, 13, and 18-27 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claims _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on _____ is: a) approved b) disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13) Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some* c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. _____.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) Notice of References Cited (PTO-892)

4) Interview Summary (PTO-413) Paper No(s). _____

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

5) Notice of Informal Patent Application (PTO-152)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s). 5

6) Other: _____

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DETAILED ACTION

Double Patenting

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 5 - 11, 13, and 18 - 27 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 - 8 of U.S. Patent No. 6,249,801. Although the conflicting claims are not identical, they are not patentably distinct

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from each other because both the present Application and U.S. Pat. No. 6,249,801 claim non-geographical load balancing based upon network proximity which is determined by the latency or the number of hops between the requestor and server.

Claim Rejections - 35 USC § 103

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(f) or (g) prior art under 35 U.S.C. 103(a).

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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4. Claims 5 - 11, 13, and 18 - ²⁷~~23~~ are rejected under 35 U.S.C. 103(a) as being unpatentable over Yu (U.S. Pat. No. 6,078,943) (Method and Apparatus for Dynamic Interval-Based Load Balancing).

4.1 Regarding claim 5, Yu discloses a method for load balancing requests on a network, the method comprising:

determining the network proximity of a requestor with respect to each of at least two servers located at different geographical locations (Fig. 2; Abstract; col. 5, lines 30 - 50; col. 4, lines 52 - 64);

designating a closest one of said at least two servers by ranking said at least two servers by network proximity (Fig. 2; Abstract; col. 5, lines 30 - 50); and

directing requests from said requestor to one of said at least two servers by having greatest network proximity (Fig. 2; Abstract; col. 5, lines 30 - 50),

said network proximity being determined by at least one of latency, hops between said requestor and each of said at least two servers and server processing capacity of each of said at least two servers (Fig. 2; Abstract; col. 5, lines 30 - 50).

However, Yu does not explicitly disclose *non-geographical* load balancing.

It would have been obvious to one of ordinary skill in the art at the time of the invention to implement non-geographical load balancing in Yu because Yu discloses an equivalent load balancing based upon “capacity parameters” which could include latency or the number of hops between requestor and server.

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4.2 Per claim 6, Yu teaches directing request from any source having a subnet that is the same as the subnet of said requestor to said closest load balancer (col. 5, lines 30 - 50).

4.3 Regarding claim 7, Yu discloses

monitoring the current load of each of said servers (col. 5, lines 30 - 50); and
performing said directing requests from said requestor to one of said at least two servers when the current load of said one of said at least two servers is less than the current load of every other of said at least two servers (col. 5, lines 30 - 50).

4.4 Per claims 8 - 11, these specific features are clearly disclosed by Yu.

4.5 Regarding claims 13 and 18 - 27, the rejection of claims 5 - 11 (paragraphs 4.1 - 4.4) applies fully.

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5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kenneth Coulter whose telephone number is (703) 305-8447.

KENNETH R. COULTER
PRIMARY EXAMINER
Kenneth Coulter

krc

September 9, 2002